



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulama v Republic (Criminal Appeal 53 of 2019)  
[2022] KEHC 12470 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 53 OF 2019  
LK KIMARU, J  
JULY 25, 2022**

**BETWEEN**

**GEORGE JUMA MULAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and Sentence in criminal case S.O. No. 135 of 2017 of chief Magistrate's court at Kitale delivered on 30th May 2019 by Hon. M.I.G. Morang'a SPM)*

**JUDGMENT**

1. The appellant, George Juma Mulama was charged with defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#). The particulars of the offence were that on diverse dates between 3<sup>rd</sup> and 8<sup>th</sup> of November 2017 at Bwake farm in Trans Nzoia County, the appellant intentionally caused his penis to penetrate the vagina of FN, a child aged 15 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that between the same dates and in the same place, the appellant caused his penis to intentionally touch the vagina of FN a child aged 15 years. When the appellant was arraigned before this court, he pleaded not guilty to the charge. After a full trial, he was convicted as charged and sentenced to serve 20 years imprisonment.
2. Aggrieved by his conviction and sentence, the appellant filed an appeal before this court. In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of circumstantial evidence by prosecution witnesses that did not establish his guilty to the required standard of proof. He faulted the trial court for relying on contradictory and fabricated evidence to convict him. He took issue with the fact that the trial court had relied on insufficient medical evidence to prove that he had committed the offence. In particular, he was angered that the trial court had not ordered for DNA to be done to establish the paternity of the complainant's child. He was finally aggrieved that his right to fair trial was infringed



in that his credible and truthful defence was disregarded by the trial court in arriving at its verdict. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed by the trial court.

3. During the hearing of the appeal, both the appellant and the prosecution presented to court written submission in support of their respective opposing cases. The appellant submitted that the charge that he was convicted of was defective in that it did not contain the proper particulars including the word “unlawful” and therefore he ought not to have been convicted on that basis. He pointed out that the trial court did not consider the fact that the medical evidence adduced did not support the charge and further that DNA should have been called to establish the paternity of the child before he was convicted of the offence. He faulted the trial court for relying on circumstantial evidence to establish the charge yet a crucial witness by the name of Sonkwe was not called to testify in the case. He was of the view that failure to call this crucial witness rendered the charge unproven. He pointed out that his cogent defence was not considered by the trial court yet he had adduced evidence that exonerated him from the crime. He thus urged the court to allow the appeal.
4. In response, the prosecution submitted that the three essential ingredients to establish the charge of defilement that is, age, penetration and the identity of the perpetrator were established to the required standard of proof. The prosecution submitted that it had established that the appellant lured the complainant and took her to his house where he kept her for five days during which period he repeatedly had sexual intercourse with her. As a result of the said confinement, the complainant got pregnant and gave birth to a child. The prosecution pointed out that it had adduced sufficient, cogent, and direct and circumstantial evidence which established the appellant’s guilt on the charge brought against him to the required standard of proof. The prosecution urged the court to disallow the appeal.
5. This being a first appeal, it’s the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial magistrate’s court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In doing so, this court is required to be conscious of the fact that it neither saw nor heard the witnesses as they testified. (See *Okeno Vs Republic* [1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution established the appellant’s guilt on the charge of defilement that was brought against him to the required standard of proof beyond any reasonable doubt.
6. For the prosecution to establish the charge of defilement, it is required to establish the three essential ingredients being the age of the complainant, penetration (which is the sexual act or assault) and finally the identity of the perpetrator. In the present appeal, to establish the age of the complainant, the prosecution called the evidence of the complainant FN who testified that she was 15 years at the time the offence is alleged to have been committed. She has just completed her primary education exams. She was born on March 24, 2002. Her mother PW2 MMH produced her birth certificate as prosecution’s exhibit No 3 which indeed confirmed that the complainant was 15 years at the time of the offence. This court therefore holds that the prosecution established to the required standard of proof that the complainant was 15 years old at the material time and therefore a child within the meaning ascribed to the term under section 2 of the *Children Act*.
7. As regards penetration, the complainant testified that she met with the appellant sometime in December 2016. They started a romantic relationship. She testified that when she completed her KCPE examinations on November 2, 2017, she was invited by the appellant to visit him at his place in Bungoma. She left her home at [particulars withheld] and went and visited the appellant at his home. She had decided to get married to him. She told the court that the appellant had bought her a mobile phone which she was able to communicate with him during the period. She stayed with the



- appellant from 3<sup>rd</sup> to November 8, 2017. During this period, they repeatedly had sexual intercourse. The appellant's mother was aware of her presence.
8. On November 9, 2017 a neighbour by the name Sonkwe informed her mother of her presence at the appellant's home. The police were informed. The appellant was arrested and taken to the police. She was taken to hospital where she was examined by PW4 Sophia Maritim, a clinical officer based at Cherengany sub-county hospital. She confirmed that there was evidence that the complainant had had sexual intercourse with the appellant whom she referred to as her boyfriend. On November 29, 2017, further test confirmed that she was pregnant. The complainant's mother PW2 testified that the complainant disappeared from home on November 3, 2017 and was only seen after five days at the appellant's home. PW2 knew the appellant as a petty trader at [particulars withheld]. When she learned of the whereabouts of the complainant, she informed the police which led to the arrest of the appellant. In late July 2018, a child was delivered by the complainant.
  9. In his defence, the appellant denied knowing the complainant. Neither did he acknowledge that he had a relationship with the complainant. Other than narrating the circumstances of his arrest, the appellant denied knowing the complainant or that he had defiled her. He testified that the medical evidence adduced had not established the assertion by the complainant that he had defiled her.
  10. On re-evaluation of this evidence, which touches on both penetration and the identity of the perpetrator, it was clear to this court that indeed the prosecution had established to the required standard of proof beyond any reasonable doubt the aspect of penetration and the identity of the perpetrator. This court believed the testimony of the complainant when she testified that she had a romantic relationship with the complainant for a period of one year before the appellant invited her to his house where she stayed for five days before the appellant was arrested and charged with the present offence. The complainant believed that her invitation to the appellant's home meant that she had been married to the appellant. During the period of five days that she was at the appellant's home, she repeatedly had sexual intercourse with the appellant. As a result she got pregnant and gave birth to a child in July 2018. Penetration was established by both the complainant's testimony and medical evidence. Although the appellant challenged the medical evidence on the basis that it was incomplete as DNA test ought to have been done to ascertain the paternity of the child, this court, nevertheless, finds that the prosecution established penetration and the identity of the perpetrator to the required standard of proof beyond any reasonable doubt.
  11. This court wondered why the appellant chose the path of denial yet if he had acknowledged that he had a relationship with the complainant, the court may have looked at his situation with sympathy. In the premises therefore, this court holds that the prosecution proved to the required standard of proof beyond any reasonable doubt that the appellant defiled the complainant, a child of 15 years of age. The appeal against conviction lacks merit and is hereby dismissed.
  12. On sentence, this court has considered the entire circumstances of the case and is of the view that the sentence of 20 years imprisonment meted on the appellant was harsh and excessive noting that the complainant was under the mistaken believe that she was getting married to the appellant when she, on her own accord, went to the appellant's home. However, since defilement is an offence of strict liability where any child less than 18 years lacks capacity to give consent to sexual intercourse, this court will reduce the custodial sentence imposed on the appellant from 20 years imprisonment to 15 years imprisonment which sentence shall take effect from November 10, 2017 when the appellant was arraigned before court. From the proceedings of the court, it was evident that the appellant was not released on bond pending trial. It is so ordered.

**DATED AT KITALE THIS 25<sup>TH</sup> DAY OF JULY 2022.**



**L. KIMARU**  
**JUDGE**

